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In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JEFFREY GRUBBS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether the Fourth Amendment requires suppression of evidence when officers conduct a search under an anticipatory warrant *after* the warrant's triggering condition is satisfied, but the triggering condition is not set forth either in the warrant itself or in an affidavit that is both incorporated into the warrant and shown to the person whose property is being searched.

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Bureau of Justice Statistics, Law Enforcement Management and Administrative Statistics, *Sherriffs' Offices 2000* (2003) 17

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Jeffrey Haningan Kuras, et al., *Thirty-First Annual Review of Criminal Procedure: I. Investigation and Police Practices: Warrantless Searches and Seizures*, 90 Geo. L.J. 1130 (2002) 22

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The NAFD is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender offices.

One of the guiding principles of the Association is to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. The Association has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals.[2]

The pending case raises important issues regarding the application of the Fourth Amendment in light of current technology and law enforcement practices. As *amicus curiae*, the Association offers its practical view of the federal criminal justice system, seen through the eyes

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] Published decisions in which the Association has appeared as *amicus curiae* include: *Newland v. Saffold*, 534 U.S. 971 (2001); *Carey v. Saffold*, 536 U.S. 214 (2002); *Pacheco-Camacho v. Hood*, 535 U.S. 1105 (2002) (mem.); *United States v. Vonn*, 535 U.S. 55 (2002); *United States v. Arvizu*, 534 U.S. 266 (2002); *Overton v. Bazzetta*, 539 U.S. 126 (2003); *Massaro v. United States*, 538 U.S. 500 (2003); *In re Olabode*, 325 F.3d 166 (3d Cir. 2003); *Kowalski v. Tesmer*, 543 U.S. 125 (2004); and *United States v. Booker*, 543 U.S. 220 (2005).

of counsel who represent a majority of those charged with federal crimes in districts throughout every federal circuit.

SUMMARY OF ARGUMENT

The Fourth Amendment mandates that search warrants must be issued by a neutral and detached magistrate and must state with particularity the place to be searched. U.S. Const. amend IV. Anticipatory warrants are search warrants which do not become effective until after a specific "triggering event" occurs (usually the delivery of known contraband to a specific location). Because anticipatory warrants attempt to predict the future, they cannot be sufficiently particular in describing the triggering event. Such warrants frustrate the particularity and neutrality sought by the Framers of the Constitution: they replace the careful analysis of a neutral magistrate with an exercise of discretion by a law enforcement officer. While allowing officers to exercise this degree of discretion might have been necessary at a time where warrants could not be secured away from the courthouse, technological advancements now enable law enforcement officers to obtain a traditional warrant telephonically even when time is of the essence. Telephonic warrants, permitted under the Federal Rules and in at least twenty different states, allow neutral and detached magistrates to issue particularized search warrants. Using basic technology that is currently available (and widely used) by law enforcement officers, telephonic search warrants further legitimate law enforcement goals to the same extent as anticipatory warrants – but unlike anticipatory warrants, telephonic warrants ensure the protection of Fourth

Amendment rights. Given this readily available alternative, anticipatory warrants are unreasonable and should be barred by the Fourth Amendment.

Even if the Court finds that anticipatory warrants are not *per se* unconstitutional, the lack of particularity and amount of officer discretion inherent in these warrants should lead the Court to set a higher standard for anticipatory warrants than for traditional or telephonic warrants. Specifically, the Court should require law enforcement officers seeking an anticipatory warrant to show that special facts exist which demonstrate that a telephonic warrant would not be feasible in their specific case: for example, that there is reason to believe the contraband in question will be destroyed or disseminated to others immediately after receipt, before a telephonic warrant can be obtained. In the present case, there were no special facts since there was no evidence that Respondent had any intent or ability to disseminate the contraband once he received it, and there was ample time for the law enforcement officers to obtain a telephonic warrant after the controlled delivery was made. Accordingly, even if anticipatory warrants are not *per se* unconstitutional, the use of an anticipatory warrant was improper here.

ARGUMENT

I. INTRODUCTION

This is the first case in which this Court will consider the validity and scope of anticipatory search warrants – warrants which premise probable cause on predictions about possible future events rather than solely on observed and known facts. The question presented asks

whether an anticipatory warrant must specify the future triggering event on its face or in an attached affidavit that is shown to the person whose home is to be searched. *Amicus* agrees with the Ninth Circuit that, if anticipatory warrants are to be used, the warrant or attached affidavit must describe this event. *Amicus* submits, however, that the Court's initial consideration of anticipatory warrants must necessarily venture beyond the narrow confines of the question presented to include a broader inquiry into the justification for these warrants and standards used to govern them. Any such inquiry must consider the technological advancements that have revolutionized law enforcement practice since anticipatory warrants first came into use.

Technology plays a central role in the way that officers detect, investigate, and apprehend criminals. With the proper judicial authorization, law enforcement officers are permitted to eavesdrop on private telephone conversations,[3] install cameras in private offices,[4] and intercept private electronic mail correspondence.[5] The effect has been even more dramatic for investigatory methods which do not require prior judicial approval: law enforcement officers use airplanes to view the exposed areas of a person's home and property;[6] videotape faces in a public area and compare them to known fugitives using facial

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[3] *See* Title III of the Omnibus Crime and Control Act of 1968, 18 U.S.C. § 2518 et seq.; *United States v. Cox*, 462 F.2d 1293, 1302-04 (8th Cir. 1972).

[4] *United States v. Koyomejian*, 970 F.2d 536, 542 (9th Cir. 1992).

[5] *See* Electronic Communication and Privacy Act, 18 U.S.C. §§ 2510-2521 (1986).

[6] *California v. Ciraolo*, 476 U.S. 207, 215 (1986).

recognition technology;[7] trace the incoming and outgoing numbers dialed from a telephone;[8] and maintain a sophisticated computer database of DNA records which have been collected from convicted felons.[9]

In short, new technologies are increasingly being used to assist law enforcement in hundreds of different ways. But these technologies can also help protect individual privacy during the investigative process. Law enforcement officers in the field can now instantaneously communicate with magistrates using commonplace technology, such as cellular phones and laptop computers. These widely available tools have the potential to minimize abuses by law enforcement officers when conducting searches of individuals' homes by allowing the officers to communicate with a magistrate in real time in order to obtain a search warrant based on events the officers have personally witnessed.

When law enforcement officers first began to use anticipatory warrants, such instant communication was rarely feasible. Lacking immediate access to the officer in the field, the magistrate would issue an anticipatory warrant, which was conditioned upon the possible occurrence of a future event. By definition, these warrants lack a certain level of particularity, since the future event could never be predicted with precision. Since the only other options available for law enforcement were either to

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[7] Christopher S. Milligan, Note, *Facial Recognition Technology, Video Surveillance, and Privacy* 9 S. Cal. Inderdis. L.J. 295, 318-19 (1999)

[8] *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979).

[9] *See* DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. § 14135 et seq.; *United States v. Sczubelek*, 402 F.3d 175 (3rd Cir. 2005).

conduct a warrantless search or find a pay phone and attempt to reach a magistrate, lower courts were willing to permit anticipatory search warrants.

Today these options have changed dramatically. Commonly available technologies have given law enforcement the ability to use telephonic warrants in a way which protects the Fourth Amendment rights of citizens but does not detract from the critical goals of law enforcement activities. In light of these changed circumstances, the Court should find that anticipatory warrants are unconstitutional or, at a minimum, require that an anticipatory warrant may only issue when law enforcement officers can show that a telephonic warrant is not feasible.

II. ANTICIPATORY WARRANTS ARE NOT REASONABLE IN LIGHT OF THE READY AVAILABILITY OF TELEPHONIC WARRANTS

A. Because They Rely On Officer Discretion, Anticipatory Search Warrants Do Not Satisfy The Particularity Requirement Of The Fourth Amendment

An anticipatory search warrant differs from a traditional search warrant in that it is issued by a magistrate *before* the evidence or contraband reaches the place to be searched. *See* 2 Wayne R. LaFave, *Search and Seizure* 3.7(c) (4th ed. 2004). The officer applying for the warrant does not demonstrate at the time of the application that probable cause exists, but rather attempts to predict that there will be probable cause at some future time. 2 LaFave at 3.7(c). These warrants are most commonly issued in cases where police officers have reason to believe that a package containing contraband will be delivered by mail to

a specific address. *Id.* (citing *United States v. Santa*, 236 F.3d 662 (11th Cir. 2000) (major drug transaction, where federal agents knew several hours earlier time and location of event); *United States v. Garcia*, 882 F.2d 699 (2d Cir. 1989) (drug couriers intercepted at border agreed to complete delivery to specified residence).

The typical case involves an international package that arouses the suspicion of customs agents, who inspect and find drugs. The agents notify federal or local law enforcement authorities and relay the anticipated delivery time and location. Law enforcement officers create a plan to monitor or control the delivery. Before the delivery, however, officers seek to obtain an anticipatory warrant so that they may execute a search immediately after the package has been delivered. For example, in *United States v. Lowe*, 575 F.2d 1193 (6th Cir. 1978), the Detroit Post Office made a "controlled delivery" of a package to the defendant's home after the international package was opened by customs officials at the post office as a part of a routine drug inspection of packages originating in Thailand, a known source of heroin. *Id.* at 1193. Law enforcement officials obtained an anticipatory warrant authorizing a search of the defendant's home and seizure of the heroin after the delivery was completed. *Id.* The package was then resealed and delivered by the post office. *Id. See also United States v. Jackson*, 55 F.3d 1219 (6th Cir. 1995) (DEA agents secured an anticipatory search warrant before the controlled delivery of a Nigerian package containing eighty grams of heroin to a Cleveland address).

In seeking an anticipatory warrant, a law enforcement officer submits the application and affidavit to a magistrate, who determines whether probable cause is likely to exist if the so-called triggering event takes place. If the

magistrate finds that probable cause is likely to exist at that future time, he will authorize a conditional search through an anticipatory warrant. The warrant will provide that it cannot be executed until the triggering event occurs – typically the delivery of the contraband to a specified address. Ideally, an anticipatory warrant narrowly describes the triggering event, the event occurs exactly as it was described, and the officer carries out the search precisely as it was authorized by the magistrate. Unfortunately, this ideal scenario is difficult to achieve, since an anticipatory warrant essentially attempts to predict what will happen in the future, and the future is inherently uncertain.

This uncertainty leads to one of two fatal defects for anticipatory warrants: either the triggering event does not occur as described, in which case the ultimate decision as to whether probable cause exists is made not by a neutral magistrate but instead by a law enforcement officer; or the triggering event is described so broadly that the warrant lacks the necessary particularity under the Fourth Amendment.

The first possibility is that the triggering event is described with sufficient particularity, but does not occur exactly as was predicted in the warrant. For example, in *United States v. Miggins*, 302 F.3d 384 (6th Cir. 2002), police officers secured an anticipatory search warrant before a controlled delivery of a package containing cocaine to the defendant's home. *Id.* at 387. The affidavit appended to the search warrant provided the following triggering event: "When [the package containing the cocaine] is delivered to this address and possession of the package is taken by someone inside 2335 Cooper Terrace, as is anticipated, then and only then will the search

warrant be executed." *Id.* at 394. However, when the controlled delivery actually occurred, one of the three co-defendants signed for the package outside of the residence and all three immediately left the premises, taking the package with them. *Id.* Even though the triggering event had not occurred, and even though there was no reason to believe that the contraband was inside the home (since the package had never been taken inside the home), the officers executed the search warrant and searched the home, finding an illegal firearm. *Id.* The defendants argued that the search of the home was invalid because the triggering event did not occur. In upholding the warrant, the *Miggins* court effectively broadened the plain language of the triggering event after the fact, opining that a "common sense reading" of the triggering event would encompass not just receipt by someone inside the defendant's residence, but also receipt by someone "who had been inside the premises just prior to the delivery of the package." *Id.* at 396. Although the *Miggins* court claims this was "common sense," the conclusion is certainly debatable: would the magistrate have found probable cause to search the home if in fact he knew that the contraband never went inside the home? The language of the triggering event implied just the opposite: the reason the magistrate believed there would be probable cause to search the home was that known contraband had just been taken inside the home. But whether the magistrate would have issued a warrant or not had the true facts been known is actually beside the point; the real problem is that the magistrate never got the chance to make the decision. Instead, the law enforcement officers made the final determination as to whether probable cause existed at the time of the search.

In attempting to avoid the problem of an unfulfilled triggering event, law enforcement officers frequently produce an anticipatory warrant with the second type of constitutional flaw: describing the triggering event in such broad terms that many possible outcomes will fulfill it. In *United States v. Ricciardelli*, 998 F.2d 8 (1st Cir. 1993), for example, the court found that an anticipatory warrant was invalid because its triggering event was too broad. *Id.* at 19-20. The warrant stated that it would not authorize a search of the defendant's home "until after delivery by mail to and receipt by [the defendant] of the . . . package containing the videotape." *Id.* at 14. The defendant was not home when the videotape was delivered, however, and he ultimately picked the package up at the local post office. *Id.* at 9-10. Because the warrant did not specify that the delivery had to take place at the defendant's home, the law enforcement officers concluded that the triggering event had been satisfied when the defendant picked up the videotape up at the post office, and they executed the warrant and searched the defendant's home. *Id.* at 10. The circuit court concluded that the officers had abused their discretion, and that "[a]n anticipatory search warrant that cedes such great discretion to the executing agents cannot withstand constitutional scrutiny." *Id.* at 12.

In short, because anticipatory warrants rely on the ability of police officers and magistrates to predict the future, they run the risk of, on the one hand, being so narrowly drawn that the triggering event is described incorrectly, thus requiring the law enforcement officer to decide if the actual triggering event that unfolds is close enough to the one approved by the neutral magistrate, or on the other hand, describing the triggering event in overly

broad terms, thus lacking the necessary level of particularity. Either way, these warrants put too much discretion into the judgment of the law enforcement officer. As the Ninth Circuit has stated:

> [A] warrant conditioned on a future event presents a potential for abuse above and beyond that which exists in more traditional settings: inevitably, the executing agents are called upon to determine when and whether the triggering event specified in the warrant has actually occurred.

United States v. Hotal, 143 F.3d 1223, 1226 (9th Cir. 1998) (quoting *Ricciardelli*, 998 F.2d at 12). Furthermore, a broad description of the triggering event can also impact innocent third parties, who may (as in the current case) accept delivery of the contraband instead of the defendant. *See* R. at 241.

This Court has held that the particularity requirement prevents general searches carried out according to police officer discretion, and "ensure[s] that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). Anticipatory warrants open the door to overbroad police discretion. They inappropriately delegate to police officers the judicial responsibility of determining probable cause, since the law enforcement officer, not the magistrate, decides when the triggering event occurs. The Fourth Amendment does not permit law enforcement officers to determine the validity of their own invasive actions. Instead, a neutral detached magistrate is meant to act as a shield between law enforcement officers conducting a search and an individual citizen. This Court

has explained that an independent, objective mind is necessary to weigh the invasion of privacy against the need to enforce the law.

> The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.

McDonald v. United States, 335 U.S. 451, 455-56 (1948). A warrant issued by a neutral and detached magistrate is necessary to protect individuals from improper searches; this role cannot be entrusted to police officers with law enforcement objectives. *Lo-Ji Sales v. New York*, 442 U.S. 319, 362 (1979). There is too much room for abuse when the officer, whose goal it is to find evidence of a crime, is asked to decide whether the prediction of an anticipatory warrant has proved to be sufficiently accurate to authorize the search.

B. Telephonic Procedures Allow Neutral Detached Magistrates To Issue Particularized Search Warrants

Despite their obvious danger, anticipatory warrants have long been deemed necessary by the lower courts. They were first evaluated by judges over thirty-five years ago, and courts in the early cases stated their concern that if anticipatory warrants were not permitted, the contraband might be destroyed or be taken off the premises before a traditional warrant could be obtained. *See, e.g., United States ex rel. Beal v. Skaff*, 418 F.2d 430, 432-34

(7th Cir. 1969) ("The nature of the article to be seized – the very real possibility that delay might have resulted in its disposal or concealment – compelled quick action by the magistrate"). Given the warrant procedures and technology available at the time, it was nearly impossible for an officer to communicate with a magistrate and procure a warrant while on the scene of a potential search. Anticipatory warrants provided courts with an alternative that allowed for some judicial control of the investigative process. Courts were willing to allow officers to apply for anticipatory warrants and exercise their discretion in executing these warrants, since the only other realistic option was to force the officer to make a warrantless search and plead exigent circumstances after the fact. *See Alvidres v. Superior Court*, 12 Cal. App. 3d 575, 581 (Cal. Ct. App. 1970) (explaining that where obtaining a traditional warrant is too time consuming, the court favors the use of anticipatory search warrants over officer reliance on exigent circumstances; no other warrant option was contemplated); *People v. Glen*, 30 N.Y.2d 252, 257 (N.Y. 1972) (noting that police face the dilemma of choosing between obtaining a search warrant in advance of a delivery, or conducting a search without a warrant).

Two significant changes have occurred since appellate courts first approved anticipatory search warrants. First, procedures for telephonic search warrants were developed and authorized by federal courts and also codified in many state procedural rules. *See* Fed. R. Crim. P. 41(d)(3) (2005) (amending Fed. R. Crim P. 41(c)(2) (1977)); Cal. Penal Code §§ 1526(b), 1528(b) (1970) (codifying the first telephonic search warrant procedure). Second, and more critically, new technologies have been developed which allow for instant verbal and written long-distance communication,

making the use of telephonic search warrants simple and practical.

Today, the Federal Rules of Criminal Procedure and procedures in at least twenty states authorize the use of telephonic search warrants.[10] It has been strongly recommended that "every State enact legislation that provides for the issuance of search warrants pursuant to telephoned petitions and affidavits from police officers." Nat'l Advisory Comm'n on Criminal Justice Standards and Goals, Report on Police 95 (1973).

Under Federal Rule of Criminal Procedure 41(d)(3), officers and agents are permitted to obtain search warrants from magistrates by communicating over the telephone or through facsimile transmission. This process involves several steps. First, the officer must prepare a proposed duplicate original warrant. Fed. R. Crim. P. 41 (e)(3)(A). Once an officer believes that he has probable cause to conduct the search, he then must communicate with the magistrate by phone or fax. *Id.* at (d)(3)(A). The magistrate must then place the applicant and any person on whose testimony the application is based under oath and make a verbatim record of the communication. *Id.* at

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[10] Lafave *supra*, at 4.3(c); Fed. R. Crim. P. 41(d)(3); Ala. R. Crim. P. 3.8(b); Alaska Stat. §§ 12.35.010-.015; Ariz. Rev. Stat. §§ 13-3914(C), 13-3915(C); West's Ann. Cal. Penal Code §§ 1526(b), 1528(b); Idaho Code § 19-4404; Ind. Code § 35-33-5-8; Iowa Code §§ 321J.10, 462A.14D (limited to specific circumstances); Kan. Stat. Ann. § 22-2502; La. Code Crim. Proc. art. 162.1; Mich. Comp. Laws Ann. § 780.651; Minn. R. Crim. P. 36.08; Mont. Code Ann. § 46-5-221; Neb. Rev. Stat. §§ 29-814.03-.05; Nev. Rev. Stat. § 179.045; N.J. Rules of Ct. 3:5-3; N.Y. Crim. P.L. §§ 690.35-.36; N.C. Gen. Stat. Ann. §§ 15A-244, -245; N.D.R. Crim. P. 41(c)(2); Or. Rev. Stat. § 133.545(5); Utah Code Ann. § 77-23-204(2); Wash. Sup. Ct. Crim. R. 2.3(c); Wis. Stat. § 968.12(3).

(d)(3)(B). The officer must then communicate the contents of the proposed duplicate to the magistrate and the magistrate must enter the contents of the proposed duplicate original warrant into an original warrant. *Id.* at (e)(3)(A) and (e)(3)(B). Any modifications discussed by the officer and the magistrate must be reflected on both the original and the duplicate. *Id.* at (e)(3)(C). If the magistrate decides that the telephonic warrant is supported by probable cause, he must immediately sign the original warrant and direct the applicant to sign the magistrate's name on the duplicate warrant. *Id.* at (e)(3)(D). Because telephonic warrant procedures such as these allow for intervention by a neutral judicial officer, they "minimize the necessity of federal law enforcement officers engaging in other practices which, at least on occasion, might threaten to a greater extent those values protected by the Fourth Amendment." Fed. R. Crim. P. 41(d)(3), Notes of Advisory Committee on Rules, 1977 Amendment (referring to former Rule 41(c)(2)).

Despite their constitutional benefits, the procedures for obtaining telephonic warrants were quite cumbersome and time-consuming when they were first introduced. In the early 1970s, acquiring a telephonic warrant could take up to two hours. Justin H. Smith, Note, *Press One for Warrant: Reinventing the Fourth Amendment's Search Warrant Requirement Through Electronic Procedures*, 55 Vand. L. Rev. 1591, 1625 n.237 (2002) (noting that in 1973, 65% of the city's telephonic search warrants were obtained in one hour or less and 35% were obtained in one to two hours). Even fifteen years after telephonic warrants were first authorized, police had to rely on local pay phones to communicate with magistrates. *See California v. Carney*, 471 U.S. 386, 404 n.16 (1985) (Stevens, J., dissenting) ("a

telephonic warrant was only 20 cents and the nearest phone booth away").

But much has changed in the past twenty years. Advances in technology now allow law enforcement officers to engage in instantaneous communication with magistrates. Law enforcement officials can use cellular telephones, portable fax machines, laptop computers, and a wide array of similar technology to communicate with a magistrate by voice, fax, or e-mail in a matter of minutes, not hours. For example, the micom3T HF radio transceiver provides reliable method for long-range wireless communications of voice, fax, email, and data.[11] Similarly, Santa Monica police cars are equipped with Motorola Spectra radios that allow officers to speak with their own department and most of the other agencies located in Southern California.[12] In Roseville, California, Pentium 3 computer hard drives are mounted in the trunks of the cars. "From the driver's seat, officers can write reports and receive dispatched information, such as suspect photos and maps, using the computer's wireless capability."[13]

Nationwide, a majority of sheriffs' offices in large jurisdictions use in-field computers or terminals, and the number is growing rapidly. In 1990, only 14% of mid-sized sheriffs' offices (those serving a population of between

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[11] http://www.motorola.com/governmentandenterprise/northamerica/en-us/public/functions/browseproduct/productdetailpage.aspx?navigationpath=id_803i/id_1387i/id_2353i/id_1575i.

[12] http://santamonicapd.org/Information/interior.htm.

[13] http://www.policeone.com/police-technology/articles/96243/; *see also* http://www.hoffmanestates.com/ police/Insideshow.shtml (displaying the inside of local Illinois police cruisers, fully equipped with video cameras, radars, laptop computers, radios, and cell phones).

100,000 and 500,000) used such technology; by the year 2000, 61% of such offices did. In the larger jurisdictions (those with a population of over 500,000), 63% of sheriffs' offices utilize this technology. Bureau of Justice Statistics, Law Enforcement Management and Administrative Statistics, *Sherriffs' Offices 2000*, at 25 (2003). The numbers for local police departments are even more dramatic: for jurisdictions of 250,000 or greater, 56% utilized in-field computers or terminals in 1990, increasing to 89% in the year 2000. Bureau of Justice Statistics, Law Enforcement Management and Administrative Statistics, *Sherriffs' Offices 2000*, at 25 (2003).

These advances in technology and their widespread adoption by law enforcement agencies have considerably shortened the length of time required to acquire a telephonic warrant from a magistrate. They make it possible for law enforcement officers to conduct valid searches pursuant to particularized warrants even when time is of the essence. Together, technological advances and telephonic warrant procedures render anticipatory warrants all but obsolete.

The most time-consuming aspect of the telephonic warrant application is the preparation of a duplicate warrant. The time required to prepare a duplicate warrant has led some courts to disfavor telephonic warrants because doing so is not a "simple procedure." *See, e.g., United States v. Manfredi*, 722 F.2d 519, 523 (9th Cir. 1983) ("A telephonic warrant may not be obtained simply by calling a magistrate. Among other things, a 'duplicate original warrant' must be prepared in writing and read to the magistrate verbatim.") However, this concern is not present in any of the scenarios for which an anticipatory warrant might be issued. If the officers have time to draft

an anticipatory warrant and submit it to a magistrate before the contraband is delivered, the officers clearly have time to prepare a duplicate warrant in advance and have it ready for submission to a magistrate. Then, instead of predicting (and using their own discretion to interpret) a triggering event, the law enforcement officers simply call the magistrate once they believe the probable cause has actually developed, and the magistrate decides whether the warrant should issue. Thus, in the situations in which an anticipatory warrant might be used, the amount of time it takes to procure a telephonic warrant from the scene of the delivery is no more than the amount of time required to communicate with the magistrate – which, given today's technology, is minimal. In short, telephonic procedures allow neutral and detached magistrates to issue particularized search warrants in essentially the same amount of time as anticipatory warrants.

C. Because Telephonic Search Warrants Maximize the Protection of Fourth Amendment Rights With No Appreciable Cost To Law Enforcement Goals, Anticipatory Warrants Are Unconstitutional

The Fourth Amendment protects against unreasonable searches and requires warrants to be issued only upon probable cause stating with particularity the place to be searched. U.S. Const. amend. IV. Furthermore, warrants must be issued by a neutral and detached magistrate. *Lo-Ji Sales v. New York*, 442 U.S. 319, 362 (1979). Like traditional written warrants, telephonic warrants satisfy the particularity and neutrality requirements of the Fourth Amendment because they are issued after the event giving rise to probable cause occurs. By contrast,

anticipatory warrants, in attempting to predict future events, fail to provide the necessary particularity, and effectively move the power to authorize a warrant from the neutral magistrate to the officer in the field.

For example, consider the typical situation where anticipatory warrants are sought: law enforcement officials are alerted to a package containing drugs by postal agents being sent to a certain location. The officers set up a controlled delivery and establish surveillance outside of the location. If operating under an anticipatory warrant, the officers would wait for the triggering event (the delivery of the package) to occur. If the triggering event does not take place as laid out in the anticipatory warrant (e.g., the defendant's sister accepts the package rather than the defendant) the decision whether to execute the search is left in the hands of the officer.

Telephonic warrants provide for particularity in this scenario. Regardless of whether the delivery unfolded as the officer anticipated, the officer would communicate the actual events to a magistrate via telephone or fax. The magistrate, and not the officer, would then make the probable cause determination. Thus, there is no conditional triggering event, only the actual event, and the neutral magistrate determines whether this event gives rise to probable cause. "A warrant authorized by a neutral and detached judicial officer is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of fettering out crime." *Lo-Ji Sales*, 442 U.S. at 362 (1979) (internal citations omitted).

Not only do telephonic warrants protect Fourth Amendment rights, they also serve as a valuable law

enforcement tool. Because telephonic warrants do not suffer from the same constitutional inadequacies as anticipatory warrants, evidence obtained under their authority will be protected from challenge by the defendant. *See, e.g., United States v. Hendricks*, 743 F.2d 653, 655 n.2 (9th Cir. 1984) (anticipatory search warrant was invalid because there was not sufficient nexus between the contraband and the house named in the warrant; once the contraband was in the place to be searched, the agents "could have so informed the magistrate so that the magistrate and not the agent could make the determination of probable cause"); *United States v. Ricciardelli*, 998 F.2d 8, 14 (1st Cir. 1993) (anticipatory warrant authorizing search of defendant's home not valid when search of defendant's home was triggered by defendant's personal receipt of contraband at post office because there was no nexus between triggering event and place to be searched); *United States v. Loy*, 191 F.3d 360, 364-67 (3d Cir. 1999) (anticipatory warrant to search suspect's home not valid because there was no showing that he would bring contraband home from post office box); *United States v. Hotal*, 143 F.3d 1223, 1226-27 (9th Cir. 1998) (anticipatory warrant not valid because it did not specify conditions precedent to execution); *United States v. Rowland*, 145 F.3d 1194, 1201 (10th Cir. 1998) (anticipatory warrant not valid because magistrate did not have sufficient information to believe contraband would be at suspect's residence at the time of the search); *United States v. Nixon*, 918 F.2d 895, 903 n.6 (11th Cir. 1990) (anticipatory warrant to search automobile would not have been valid because officers were not sure what type of car suspect would be driving or whether suspect would make the trip); *United States v. Flippen*, 674 F. Supp. 536, 539-40 (E.D. Va. 1987) (court finds that anticipatory warrants are not justified for pornography

cases because ample time exists to obtain a traditional or telephonic warrant). Finally, it should be noted that barring anticipatory warrants will not create any extra burden on the court system: procedures already exist in many jurisdictions for telephonic warrants, and telephonic warrants do not require any more financial resources or time commitment than anticipatory warrants.

The present case exemplifies the preferability of telephonic warrants over anticipatory warrants. Grubbs's arrest was the result of a four-month investigation by the United States Postal Service into his internet purchase of a single video tape containing sexually explicit material involving a minor. R. at 0034. Prior to the arrest, the federal agents obtained an anticipatory warrant to search Grubbs's residence. The affidavit submitted with the warrant application provided that the warrant would not be executed "unless and until the [video] has been received by a person(s) and has been physically taken into the [Respondent's] residence." R. at 0020-21.

At 7:20 A.M. on the morning of the Respondent's arrest, an undercover postal inspector delivered the videotape to the Respondent's home. R. at 0241. Shortly after the delivery, the Respondent left his home and walked to his car. R. at 0034. The tape was not in his possession and there was no evidence that he ever saw the tape or knew of its delivery. *Id*. There was no evidence that the contraband would be destroyed or disseminated to others. Thus, the officers had sufficient time to secure the premises and obtain a telephonic warrant, thereby allowing a magistrate to make the critical decision as to whether probable cause existed and issue a warrant with the required level of particularity.

Some argue that without anticipatory warrants, law enforcement officers will eschew telephonic warrants in favor of warrantless searches under the guise of the exigent circumstances exception to the warrant requirement. *See, e.g.*, Andrew M. Belt, Comment, *Anticipatory Search Warrants: State and Federal Applications and Their Future in Maryland*, 28 U. Balt. L. Rev. 337, 375 (1999). Properly interpreted, the exigent circumstances exception would not allow such abuse, at least not in those circumstances when an anticipatory warrant would be considered. A search is valid under the exigent circumstances exception only when there is probable cause to support a search or seizure and either: (1) the evidence sought is in imminent danger of destruction, *Cupp v. Murphy*, 412 U.S. 291, 294-96 (1973); (2) the safety of police officers or the public is in danger, *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967); (3) the police are in "hot pursuit" of a suspect, *United States v. Santana*, 427 U.S. 38, 42-43 (1976); or (4) to prevent the suspect's escape, *Minnesota v. Olson*, 495 U.S. 91, 100 (1990). *See generally* Jeffrey Haningan Kuras, et al., *Thirty-First Annual Review of Criminal Procedure: I. Investigation and Police Practices: Warrantless Searches and Seizures*, 90 Geo. L.J. 1130, 1157 (2002). The only possible justification that could apply in the context of a controlled or monitored delivery of contraband to a known location is the risk of imminent destruction of evidence, and even that that risk does not exist in the vast majority of cases in which an anticipatory search warrant is used. In order to justify such a warrantless search, the officers would have to convince a court that the suspect was aware of the officers' surveillance and was therefore likely to destroy the evidence as soon as it arrived. *See, e.g., United States v. Tovar-Rico*, 61 F.3d 1529, 1535 (11th Cir. 1995) (police

believe that others inside the residence would destroy evidence was not reasonable because those inside were unaware of police activity); *United States v. Torres*, 705 F.2d 1287, 1297 (11th Cir. 1983) ("There is no evidence that [the Defendants] were aware of the officers' surveillance; thus [the Defendants] had no reason to destroy the contraband or to flee the premises. Without an imminent risk of destruction of the evidence, the agents had no right to enter the house without a search warrant").

Officers should be required to obtain a traditional warrant in every situation – by telephonic or written means *after* the event giving rise to probable cause occurs – unless exigent circumstances exist (i.e., they reasonably believe there is a danger of imminent destruction of evidence). Relying on anticipatory warrants is unreasonable when it is equally feasible to obtain warrants that fully comply with the Fourth Amendment. Through telephonic warrants, law enforcement officers can protect the suspect's Fourth Amendment rights and still conduct their investigation effectively.

III. EVEN IF THE COURT FINDS ANTICIPATORY WARRANTS TO BE REASONABLE, THESE WARRANTS SHOULD ONLY BE USED WHEN OFFICERS ARTICULATE SPECIAL FACTS JUSTIFYING THEIR INABILITY TO OBTAIN A TELEPHONIC WARRANT AFTER THE OCCURRENCE OF THE EVENT GIVING RISE TO PROBABLE CAUSE

Even if this Court finds that anticipatory warrants do not violate the Fourth Amendment, it should acknowledge that these warrants increase the discretion exercised by

law enforcement officials and thereby represent an unusually severe intrusion upon individual rights. Because of this increased intrusion, the Court should limit the use of these warrants to situations in which the law enforcement shows a specific need to rely upon them. Anticipatory warrants should be prohibited unless law enforcement officials can set forth objective reasons why a telephonic warrant would not be feasible under the circumstances. In other words, anticipatory warrants should only be permitted in cases in which special facts exist – when officers can present objective evidence at the time of the warrant application that the contraband is likely to be immediately destroyed or disseminated upon delivery.

This proposed test for anticipatory warrants would differ from the test for warrantless searches on exigent circumstances. The exigent circumstances exception requires the law enforcement officer to demonstrate that *at the time of the search*, the evidence was in imminent danger of destruction, *Cupp*, 412 U.S. at 294-96, or the search was necessary to prevent the suspect's escape, *Olson*, 495 U.S. at 100.[14] The test for an anticipatory warrant would require the law enforcement officer to establish *at the time of the warrant* that there was reasonable cause to believe that the contraband would be destroyed or (more likely) disseminated so quickly after delivery that there would not even be time to procure a telephonic warrant. Such a showing would include evidence as to how long it would take to obtain a telephonic

[14] As noted in Part I.C., *supra*, there are other potential justifications for a warrantless search pursuant to the exigent circumstances exception, but they are not applicable in the anticipatory search warrant context.

warrant under the conditions of the controlled delivery, as well as evidence that supports the contention that the suspect would likely destroy or disseminate the contraband during that brief time period.

For example, special facts justifying issuance of an anticipatory warrant might exist when officers conduct a controlled delivery of narcotics to a known dealer. Narcotics often impose obstacles to effective police detection – they tend to be used up or distributed quickly upon delivery and are easily disposed of when suspicion of police involvement arises. Similarly, if a digital file containing child pornography is delivered to a suspect over the internet, and law enforcement officials have reason to believe the suspect will immediately transmit or post the illegal images over the internet, officers may have reason to resort to the use of an anticipatory warrant in order to immediately secure the premises and seize the contraband.

This proposed standard would make it more difficult to obtain anticipatory warrants, but would still be easier to meet than the exigent circumstances test, which requires a belief that there is *imminent* danger of destruction. Thus, anticipatory search warrants would be placed in the appropriate spot along the spectrum of permissible searches under the Fourth Amendment: more intrusive (and thus requiring more justification) than traditional or telephonic warrants, but not as intrusive (and thus requiring a lesser justification) than a warrantless search under the exigent circumstances exception.

The proposed standard would also resolve a circuit split regarding the showing that must be made before anticipatory warrants issue. At present, there is no uniformity

among the federal courts as to when and how anticipatory warrants are issued. Magistrates in the First, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits will issue an anticipatory warrant if the contraband is on a "sure course" to the place that will be searched. *See Ricciardelli*, 998 F.2d at 13 (1st Cir. 1993) (adopting the "sure and irreversible course" standard as a means of judging the validity of anticipatory warrants); *United States v. Goodwin*, 854 F.2d 33, 36 (4th Cir. 1988) (anticipatory search warrant valid where the package is on a "sure course to its destination, as in the mail"); *United States v. Lawson*, 999 F.2d 985, 988 (6th Cir. 1993) (approving the proposition that a search warrant may be based solely on the fact that a package containing illegal substances is on a "sure course" to a destination); *United States v. Brack*, 188 F.3d 748, 757 (7th Cir. 1999) (requiring contraband to be on a "sure course" for a valid anticipatory warrant because of potential for abuse); *United States v. Hale*, 784 F.2d 1465, 1468-69 (9th Cir. 1986) ("an affidavit in support of an anticipatory search warrant must show that the property sought is on a sure course to the destination targeted for the search").

On the other hand, magistrates in the Second, Third, Fifth, Tenth, and Eleventh Circuits discuss "sure course" only as one factor under the totality of the circumstances analysis for determining probable cause. *United States v. Garcia*, 882 F.2d 699, 702 (2nd Cir. 1989) (recognizing "sure course" as a factor in deciding whether an anticipatory is constitutional); *United States v. Loy*, 191 F.3d 360, 365 (3d Cir. 1999) (using "sure course" as a factor in determining the existence of probable cause); *United States v. Wylie*, 919 F.2d 969, 974-76 (5th Cir. 1990) (approving the issuance of an anticipatory warrant even after

the package had been delivered to the place to be searched); *United States v. Rowland*, 145 F.3d 1194, 1204 n.3 (10th Cir. 1998) (describing "sure course" as a "proxy for the actual presence of the contraband" at the place to be searched, but declining to decide whether "sure course" is a requirement for valid anticipatory warrants); *United States v. Santa*, 236 F.3d 662, 672 n.14 (11th Cir. 2000) (explaining that the court's previous "sure course" requirement in *United States v. Nixon*, 918 F.2d 895, 903 n.6 (11th Cir. 1990) was merely dictum and not controlling). This confusion should be replaced with a standard test that requires a showing of (1) probable cause at some narrowly defined point in the future and (2) special facts which demonstrate the inability to obtain a telephonic warrant at the point at which probable cause develops. Only a showing of these special facts justifies issuing a warrant that puts increased discretion into the hands of law enforcement officials.

Under this proposed test, the search in Grubbs's case was invalid. The special facts that often exist in narcotics deliveries or digital child pornography transmissions did not arise in the present case. The police monitored Grubbs over a four-month period as he communicated with an undercover agent about purchasing videos depicting minors engaged in sexually explicit conduct. R. at 0009-10. During this period, there was no suggestion that Grubbs was a dealer or distributor of pornographic videos. R. at 0017-18. Under the plan for the controlled delivery, seven postal inspectors and three patrol officers set up surveillance around the Grubbs's home in preparation of delivery. R. at 0241. The contraband consisted of a single videotape, and there was no evidence showing that the Respondent intended to deliver the tape to others, nor that he could

feasibly have done so in the short amount of time that would have been required to obtain a telephonic warrant while his house was under surveillance. Thus, special facts were non-existent in this case. At the time of the warrant application, the police officers had no reason to suspect that upon delivery the video would be destroyed or disseminated. In such circumstances, a telephonic warrant would have been reasonable, while an anticipatory warrant was not.

CONCLUSION

As this Court has noted before, "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *United States v. Kyllo*, 533 U.S. 27, 34-5 (2001). Law enforcement officers have at their disposal countless high-tech tools to assist them in their detection and investigation of crimes, such as DNA analysis, sophisticated computer databases containing personal information, and videocameras installed in public areas. These tools all enhance law enforcement officers' ability to catch criminals while at the same time changing the conception of what is considered private information. As new technologies are becoming more and more commonplace and increasingly being used to assist law enforcement in detecting crime more efficiently, courts should ensure that the same technologies are used – when possible – to protect individuals' rights. *See* John Henry Hingson III, *Telephonic and Electronic Search Warrants: A Fine Tonic for an Ailing Fourth Amendment – Part One*, 29 Champion 38, 39 (2005).

Grubbs's case is a perfect example of law enforcement officers' selective use of new technology. Federal agents used modern technology throughout the investigation in order to detect and apprehend Grubbs: they placed an advertisement for their video in internet chat rooms, sold the video to the Respondent over a website, corresponded with him at length over e-mail, and utilized a public access information search system to gather information about him in order to plan the controlled delivery. R. at 0009-17. Yet when the time came to exercise the warrant, the police failed to use the most basic technology in order to ensure that the Respondent's Fourth Amendment rights would be protected.

Respectfully submitted,

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